

*Statement of Christine Cote
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Before the Committee on Veterans' Affairs
United States House of Representatives
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Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before you on behalf of the National Veterans Legal Services Program (NVLSP). NVLSP is an independent, non-profit veteran service organization that has been assisting veterans and their advocates for twenty-seven years. We publish numerous advocacy materials, recruit and train volunteer attorneys, and train service officers from such veterans service organizations as The American Legion and Military Order of the Purple Heart in veterans benefits law. NVLSP also represents veterans and their families on claims for veterans benefits before VA, the U.S. Court of Appeals for Veterans Claims (CAVC), and other federal courts.

My testimony today will focus on what happens when an individual, whose claim for VA benefits is pending, dies before the adjudication process is complete.

A. The Current Law

If an individual, who has filed a claim for VA benefits, dies while the claim is pending before a VA regional office, the Board of Veterans' Appeals, or a

reviewing court, the pending claim dies as well. This is true for claims for disability compensation, pension, dependency and indemnity compensation (DIC), and death pension. See *Richard v. West*, 161 F.3d 719 (Fed. Cir. 1998); *Zevalkink v. Brown*, 102 F.3d 1236 (Fed. Cir. 1996); *Landicho v. Brown*, 7 Vet. App. 42 (1994). A survivor may not step into the shoes of the deceased claimant to continue or to appeal the claim—no matter how long the claim has been pending in the VA claims adjudication process.

B. The Route Surviving Family Members Have to Travel to Obtain Benefits Based on the Deceased Claimant's Claim

As a logical matter, some benefit claims that do not result in a final decision because the claimant dies before a final decision could be issued would result in a grant of benefits if the claimant had lived. Congress has provided a limited opportunity for certain specific surviving family members to obtain the benefits the deceased claimant had been seeking at the time of death. This opportunity for accrued benefits is quite limited however, as I will describe below.

1. Only Certain Family Members May Apply for Accrued Benefits

In order to obtain the benefits that the deceased claimant was seeking at the time of death, a brand new claim for benefits, called accrued benefits, must be filed. See 38 U.S.C. § 5121, 38 C.F.R. § 3.1000. Only certain surviving family members may pursue a claim for accrued benefits. An individual satisfying the definition of a surviving spouse may apply for accrued benefits. If there is no surviving spouse, a surviving child may qualify as a claimant, but only if he or she

is: (a) unmarried and under the age of 18; or (b) under the age of 23, unmarried, and enrolled in an institution of higher education. If there is no surviving spouse or qualifying surviving child, a surviving parent may apply for accrued benefits but only if he or she was financially dependent on the claimant at the time of the claimant's death. No brothers or sisters or other family members may apply for accrued benefits. See 38 U.S.C. §§ 101, 5121; 38 C.F.R. § 3.1000(d).¹

2. Time Limits

The application for benefits must be filed within one year of the date of the claimant's death. VA regulations do allow for extensions of time to file outside of the one-year period, but only if the survivor is able to demonstrate "good cause". 38 C.F.R. § 3.109(b). Thus, the VA may allow for an extension of time, but is not required to do so.

3. No New Evidence Can Be Submitted

The survivor also cannot submit new evidence to show that the deceased claimant is entitled to the benefits sought. Accrued benefits determinations can only be "based on evidence in the file at date of death." 38 U.S.C. § 5121 The VA regulations provide that "evidence in the file" means evidence within the VA's constructive possession, on or before the date of death, but that would only include evidence like existing service personnel records or existing VA medical records. See 38 C.F.R. § 3.1000(a); 67 Fed. Reg. 65,707 (2002).²

¹ There is one narrow exception: Accrued benefits may be paid to reimburse any individual who bore the expense of the last sickness or burial—but only to the extent of the actual expenses incurred.

² The accrued benefits statute does provide that if a survivor's application "is incomplete at the time it is originally submitted, the Secretary shall notify the

4. Limitations on the Types of Benefits that Qualify as Accrued Benefits

The opportunity for a qualified survivor to receive accrued benefits under section 5121 is restricted to pending claims of the deceased for “periodic monetary benefits.” To be a claim for “periodic monetary benefits”, the benefits must be the type that are “recurring at fixed intervals”, such as disability compensation.

Many claims are for benefits that are not periodic monetary benefits. For example, in *Pappalardo v. Brown*, 6 Vet.App. 63 (1993), the Court held that a claim for a one-time payment for specially adapted housing reimbursement assistance under 38 U.S.C. Chapter 21 did not qualify as a claim for periodic monetary benefits for purposes of Section 5121. This is so even though the family had already incurred the expense of remodeling the home in accordance with standards approved by the Boston VARO to meet the needs of the veteran, who had lost the use of both lower extremities twenty years earlier due to service-connected post-encephalitic Parkinson’s disease, and who died while the housing assistance claim was pending. Thus, an accrued benefits claim may

claimant of the evidence necessary to complete the application.” 38 C.F.R. § 3.1000(c)(1) However, this “evidence necessary to complete the application for accrued benefits” is information necessary to establish that the survivor is within the category of eligible survivors and circumstances exist that make the survivor the specific person entitled to the accrued benefits. That is to say, materials including the death certificate of the deceased claimant, marriage certificates demonstrating the status of an individual as a surviving spouse, birth certificates demonstrating the status of an individual as a child, or documentation of enrollment in studies at an educational institution are the only types of additional evidence that may be introduced. 67 Fed. Reg. 65,707 (2002).

only be granted if the deceased claimant would have been entitled to a benefit like monthly disability compensation or special monthly compensation benefits.

5. Limitations on the Amount of Benefits

The amount of accrued benefits available to a survivor may also be limited. For veterans who died prior to December 16, 2003 (the date of enactment of the Veterans Benefits Act of 2003), family members cannot receive more than two years' worth of accrued benefits, even if, for example, the survivor is able to prove that the veteran was entitled to ten years worth of benefits. The enactment of the VBA of 2003 removed the two-year cap, but only when the claimant with a pending claim died on or after December 16, 2003. Pub. L. No. 108-183, § 104, 117 Stat. 2651 (Dec. 16, 2003).³

C. The Recent Court Decision Carving Out an Exception to the Harsh Rules that Currently Exist

Probably the harshest part of the rules that apply when a claimant with a pending claim dies before a final decision is rendered is that the survivor must start the claim all over again at a VA regional office, regardless of how far the pending claim had proceeded in the adjudication process. Even if the pending claim had made it up the chain to a reviewing court, which often takes many years, the survivor, who may be elderly or infirm, must still file a new claim at the VA regional office level and “go to the back of the line.” The inability of the survivor to substitute and pick up where the claimant left off can add years to the claims

³ For deaths occurring on or after December 16, 2003, successful accrued benefits claimants are now entitled to the entire amount of benefits that would have been paid had death not occurred.

process and add to the burden of the agency, which must now address an entirely new claim where there had already been development of another claim raised by the deceased.

Frustrated survivors have long sought to continue to prosecute a deceased claimant's disability compensation claim at the Court level. See, e.g., *Zevalkink, supra*; *Landicho, supra* at 47. In *Padgett v. Nicholson*, 473 F.3d 1364 (Fed.Cir. 2007), issued just last month, the Federal Circuit carved out a very limited exception to the harsh rule that a claim dies with the claimant.

1. The facts

Mr. Barney Padgett, a World War II combat veteran, was awarded service connection by the VA for residuals of a left-knee injury in August 1945. In June 1976, service connection was granted by the VA for traumatic arthritis of the left knee and for a residual sprain of the left knee.

In March 1993, Mr. Padgett sought service connection for a right hip disorder-which he alleged was caused by the service-connected left-knee disability. The VA regional office denied the claim. On appeal, the Board, in an April 1997 decision, remanded the claim for further development, including a hearing. The regional office continued the denial in an August 1997 rating decision. In August 1999, the Board forwarded the claim to the VA Medical Center in Columbia, South Carolina for a medical opinion. The Board continued its denial in a December 23, 1999 decision.

On appeal to the CAVC, the Court remanded the claim back to the Board for readjudication on March 26, 2001. The Board issued a new decision on August 8, 2002, again denying service connection for a right hip disability.

Mr. Padgett appealed the matter for a second time to the Court of Appeals for Veterans Claims. Briefs were filed, and oral argument was conducted in April, 2004. The parties filed supplemental pleadings and briefs and the matter was referred to the full Court for disposition in September, 2004.

On April 19, 2005, more than twelve years after Mr. Padgett initiated his claim, the Court issued a decision reversing the Board's denial and ordering the VA to grant the veteran's disability claim for a hip condition. That same month, however, counsel for the veteran learned that Mr. Padgett died on November 3, 2004, before the Court's decision. The Secretary immediately filed a motion to rescind the reversal and dismiss the appeal. The veteran's surviving spouse, Mrs. Padgett, filed a motion to be substituted as a party to the appeal. The CAVC granted the VA's motion to dismiss and denied Mrs. Padgett's motion for substitution, following the normal rule that the claim died when Mr. Padgett died.

2. The Federal Circuit's Decision

NVLSP appealed the Veterans Court's decision on Mrs. Padgett's behalf to the U.S. Court of Appeals for the Federal Circuit. NVLSP argued that applying to the Padgetts the normal rule that a claim dies with the veteran would be exceedingly harsh. Mr. Padgett spent the last 12 years of his life battling the VA for disability

benefits for his hip disability. He finally won that battle in April 2005, when the Court of Appeals for Veterans Appeals ruled that the Board's denial of his claim was clearly erroneous.

But merely because Mr. Padgett died a few months prior to the Veteran's Court decision, the Veterans Court wiped this victory off the books. For Mrs. Padgett to recover the 12 years of disability benefits that would have been owed by the VA to her husband if he had lived longer, the normal rule required her to start the process all over again by filing a new claim with the VA regional office for accrued benefits. And to add insult to injury, because the normal rule required the Veterans Court to wipe its April 2005 decision off the books as if it had never occurred, the regional office would not be required to grant Mrs. Padgett's claim for 12 years of accrued benefits. The regional office would be free to deny Mrs. Padgett's claim for the same reason that it had denied Mr. Padgett's claim on numerous occasions over the preceding 12 years.

Recognizing the harshness of the normal rule that a claim dies with the claimant, the Federal Circuit responded to Mrs. Padgett's appeal by carving out a very narrow exception. In a case like Mr. Padgett's, in which: (a) the veteran had appealed his claim all the way to the CAVC; (b) the CAVC issued its decision before it became aware that the veteran had died; and (c) the death occurred after all of the legal briefs had been filed with the CAVC so that there was nothing left to do but to issue a decision; then (d) the CAVC could keep its decision on

the books by making it effective retroactive to the date of the veteran's death, and allow the surviving spouse to substitute for the veteran in the appeal before the CAVC.

As a result of the Federal Circuit's decision, Mrs. Padgett quickly received over \$50,000 in tax-free VA benefits – representing 12 years' worth of disability benefits for Mr. Padgett's hip disability. Because of the harsh rule that the claim dies with the claimant, most surviving family members of a veteran who dies while his claim is pending before the VA are not this lucky.

A recent VA General Counsel Opinion, VAOPGCPREC 2-2007, held that the decision in *Padgett* would have no effect on an appeal pending before the BVA when a claimant dies. The General Counsel held that 38 C.F.R. § 20.1302 would require the Board to dismiss an appeal pending before the Board when the claimant dies-and survivors of a deceased claimant seeking accrued benefits at the Board level will still have to go to the "back of the line".

Thank you for holding such an important hearing and allowing us to highlight some of the problems faced by survivors when a veteran or other claimant dies. I would be happy to answer any questions that you may have at this time.